

Understanding Program Access and Structural Accessibility under the ADA

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The Americans with Disabilities Act of 1990 (ADA) is a major **Civil Rights** law prohibiting discrimination on the basis of disability and is probably the most recognized law relating to accessibility for persons with limited abilities.

The Architectural Transportation Barriers Compliance Board, known as the "Access Board" was established as part of the Rehabilitation Act of 1973. It is required by the ADA to publish guidelines to ensure buildings, facilities, and vehicles covered by the law are accessible. The Americans with Disabilities Act Accessibility Guidelines known as "ADAAG" serves as the basis for standards issued by the Department of Justice (DOJ) and departments of Transportation (DOT). DOJ enforces most parts of the ADA. The ADAAG establishes the minimum technical and scoping requirements for buildings, facilities, and site elements when provided, that must be accessible. This includes Title II entities "State and local government sectors", and Title III, "Places of Public Accommodations".

Whether intentional or not, architectural barriers are often created by designers and planners that prevent persons with disabilities from enjoying freedom of unrestricted access to the facility, site, or services. This is particularly true of outdoor recreational facilities and sites. The ADAAG doesn't specifically address many types of recreational sites, elements, or facilities yet in rule. Applying the ADAAG guidelines for the indoor or "built" environment in the outdoors doesn't provide much consistency. State and local building codes address structural features through performance or prescriptive building codes that set minimums and maximums for buildings and facilities.

Adhering to specific guidelines and minimum performance standards alone do not guarantee a barrier-free or universally accessible environment. Too often minimum and maximum technical and scoping provisions in the ADAAG or local building codes standard become the default standard for design. The ADAAG standards are negotiated standards that provide a minimum level of access. They should be used as guidance rather than used as meeting the code. Just meeting the code is an attitude that may conflict with the spirit and intent of equal access. Even though the minimum ADA building or performance standard is followed, the "program access" requirement may not be fulfilled.

Some examples of architectural barriers are steps instead of a ramp, a steep ramp instead of the right slope, without the handrails. Designated accessible parking stalls on a sloped, soft surface, without proper signage might be another simple example of a barrier to a person with a disability. Other types of barriers to access might be lack of communication or signage indicating information.

Program Access

Program access can be complex and is the most often misunderstood requirement of the ADA. See federal register volume 56 no 144 Subpart "D"-Program Accessibility section 35.149, 35.150, (28 CFR Part 35). Each service, program, or activity must be operated so that when viewed in its entirety, is readily accessible to and useable by individuals with disabilities. Exceptions are made if it would result in a fundamental alteration in the nature of the service, program, activity or an undue financial or administrative burden. Program access looks at the whole picture and requires the entity to identify their programs and determine if they are accessible and useable by all persons. If other methods of achieving compliance are not effective, then removing any possible structural barriers that prevent access would be required.

The good news is that the ADA allows an entity to identify what their programs are. Program access may not include a structural modification if it is not identified as the barrier. The barrier may be a communication barrier.

Policy and administration changes along with other changes may meet the requirement of program access. When the program access includes alterations or modifications of the rules, policies, or procedures, many agencies and entities fail to properly make the right changes or choices and address the real issue.

If the alteration or modification to achieve program access would substantially alter the primary purpose or function of the site, facility, program, or if it would be an undue burden (must be defensible) it may not be required.

While program access includes removing architectural barriers as identified, it also helps in removing attitudinal barriers by encouraging different solutions or approaches to remove barriers. Program access means inclusion rather than exclusion by creating separate programs. Often in the past separate activities and programs were the way to achieve access for persons with disabilities that could not participate with the able-bodied persons seeking that form of recreation.

It is allowable to have a separate program and sometimes that may be the only option for participation. If a separate program exists, it is not required to be utilized by the person with a disability. In a recent court decision, a rule modification was not allowed for a disabled racquetball athletic as a reasonable accommodation because it would have been a fundamental alteration in the primary purpose of the game. The question to modify a program to provide access is often a case-by-case decision based on the request and entities ability to provide it without a fundamental alteration of the program.

ADAAG Rule Status

The ADAAG rules were first published in early 1990's. The ADAAG is used most often and referenced today when considering access issues. Federal agencies and any agencies receiving federal dollars have had an obligation for years under the Architectural Barriers Act of 1968 (ABA) to provide access to facilities altered or built with federal funds. Some federal agencies follow the Uniform Federal Accessibility Standards (UFAS), the basis for ADAAG.

On July 23, 2004 the Access Board published a new Final Rule containing the revised ADA-ABA accessibility guidelines. This document reflects a closer alignment to 2003 International Building code. This rule includes playgrounds, golf, pools, spas, places of amusement, boating and fishing facilities. The 1999 "Developed Outdoor Areas" final report is due to be published as a proposed rule sometime in 2005 under the authority of the Access Board.

Final rules issued by the Access Board are the best and latest information about accessibility requirements for architectural barriers. It does not become an enforceable rule by other federal agencies or the Department of Justice (DOJ) until they approve the same final rule. Many times the DOJ has been too busy or for political reasons hasn't adopted the Access Board's final rules so they become enforceable standards. In September Of 2004 DOJ published it's notice of advanced rule making for the revised ADAAG. There is a comment period through May of 2005.

From a risk management perspective, it is advisable to follow the latest access board final rule when none other exists because that is the rule when adopted by DOJ that will be enforced. Also local courts and jurisdictions have used access board rules to make decisions on cases brought to court where no other local, state, or federal laws exist.

The access board process to publish a final rule is long and complex. One of the last steps is to complete a regulatory assessment of the final rule before they can submit it to the Office of Management and Budget (OMB) for review. The final rule for places of amusement, play fields, golf, boating, and fishing published in June of 2003 took almost ten years to become a rule. In July 2004 revised final rule for ADA and ABA was published. The next proposed final rule due out in 2005 is for Outdoor Developed Areas. This includes trails, beaches, camping, and picnic facilities. It has been proposed to be applicable only for federal agencies and those recipients of federal funds so they can assess the impact before making it binding on other public agencies and places of public accommodation. The IAC will continue to use information from the Access Board and the Outdoor Developed Areas report for guidance to measure the minimum access requirement.

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